RANJIT SINGH JARNAIL SINGH

v.

MALAYAN BANKING BHD

COURT OF APPEAL, PUTRAJAYA
HISHAMUDDIN MOHD YUNUS JCA
CLEMENT SKINNER JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: W-02-1104-2011]
17 DECEMBER 2013

CONTRACT: *Breach - Allegation of - Auction - Appellant successful bidder of property - Contract of sale entered into between parties - High Court allowed chargor's application to set aside sale of property due to respondent's failure to adhere to provisions of National Land Code - Appellant commenced suit against respondent for breach of negligence and breach of duties - Whether there was contract between parties - Whether respondent exercised its statutory remedy of sale as chargee - Whether respondent in breach of collateral warranty that order for sale obtained lawfully*

LIMITATION: *Accrual of cause of action - Commencement of suit - Whether action filed within limitation period - Whether appellant's action caught by limitation - Limitation Act 1953, s. 6(i)(a)*

The respondent bank, as chargee of a piece of land ('the said property'), obtained an order for sale by public auction of the said property from the High Court. The appellant attended the auction and was the successful bidder for the said property at RM116,000 on 12 September 1990. The appellant duly paid all sums due under the auction sale but the said property could not be transferred to him as there was a private caveat entered against the said property. On 14 June 1997, the High Court allowed the chargor's application to set aside the order for sale as well as the sale of the said property on the principle ground that the notice of adjourned hearing of the application for sale was not served on the chargor. The appellant had intervened in the chargor's application to set aside the order for sale. The respondent appealed against the High Court order, which was dismissed by the Court of Appeal. On 16 December 2004, the appellant commenced this suit against the respondent, pleading breach of contract, misrepresentation, negligence and breach of duties. The

A High Court dismissed the appellant's claims. Thus, the appellant appealed, contending that (i) the Judicial Commissioner ('JC') erred in holding that there was no contract between the appellant and the respondent; (ii) the JC had disregarded the fact that in the contract of sale entered into after the successful auction, the B respondent bank was described as 'the vendor'; and (iii) that the JC failed to consider that the respondent was in breach of a collateral warranty that the order for sale was obtained by the respondent lawfully.

C **Held (dismissing appeal with costs)**
Per Clement Skinner JCA delivering the judgment of the court:

(1) This was not a normal case of a person selling his property as 'vendor' to an interested 'purchaser'. The respondent was D exercising its statutory remedy of sale as chargee of the property under the National Land Code. The court will always look at the true substance of the transaction and not the badge or term of convenience used by the parties. Despite the use of the term 'the vendor' to describe the respondent in the E contract of sale, it did not detract from the fact that the respondent had sold the said property as 'chargee'. (para 11)

(2) The reason the appellant could not become the registered proprietor of the said property was not because the F respondent had breached the terms of the alleged 'contract' which was entered into after the successful auction, but because the order for sale was set aside some years later, on grounds totally unrelated to the contract of sale entered into after the auction. Therefore, the respondent could not be said G to be in breach of contract as alleged. (para 12)

(3) There was no substance in the appellant's contention that the respondent was in breach of a collateral warranty that the order of sale was obtained lawfully. As at that date, the order H for sale was still a perfectly valid order and had to be complied with and could be relied on until set aside. The evidence showed that when the auction sale was held on 12 September 1990 there was no pending application to set aside the order of sale. Therefore the question of the I respondent being in breach of the alleged implied warranty did not even arise. (para 13)

(4) The appellant's causes of action against the respondent were founded on contract and tort and would have accrued when the High Court set aside the order of sale on 14 June 1997, but this suit was commenced by the appellant only on 16 December 2004, which was well after six years from 14 June 1997. Clearly, the appellant's action was caught by limitation. (paras 16 & 17)

Bahasa Malaysia *Translation Of Headnotes*

Bank responden, selaku pemegang gadaian sebidang tanah ('hartanah tersebut'), telah memperoleh perintah jualan melalui lelongan awam hartanah tersebut dari Mahkamah Tinggi. Perayu telah menghadiri lelongan dan telah berjaya membida hartanah tersebut pada harga RM116,000 pada 12 September 1990. Perayu membayar dengan sewajarnya semua jumlah yang terhutang di bawah jualan lelongan tetapi hartanah tersebut tidak boleh dipindah milik kepadanya kerana terdapat kaveat persendirian yang dimasukkan terhadap hartanah tersebut. Pada 14 Jun 1997, Mahkamah Tinggi telah membenarkan permohonan penggadai untuk mengenepikan perintah jualan dan penjualan hartanah tersebut atas alasan utama bahawa notis penangguhan perbicaraan permohonan jualan tidak diserahkan kepada penggadai. Perayu telah campur tangan dalam permohonan penggadai untuk mengenepikan perintah jualan. Responden telah merayu terhadap perintah Mahkamah Tinggi, namun telah ditolak oleh Mahkamah Rayuan. Pada 16 Disember 2004, perayu telah memulakan guaman ini terhadap responden, dengan memplidkan bahawa terdapat pelanggaran kontrak, misrepresentasi, kecuaian dan pelanggaran kewajipan. Mahkamah Tinggi menolak tuntutan-tuntutan perayu. Oleh itu, perayu merayu, dengan hujahan bahawa (i) Pesuruhjaya Kehakiman ('PK') khilaf apabila memutuskan bahawa tiada kontrak di antara perayu dan responden; (ii) PK telah tidak mengambilkira fakta bahawa dalam kontrak jualan yang dimeterai selepas kejayaan lelongan itu, responden bank telah digambarkan sebagai 'penjual'; dan (iii) PK telah gagal untuk mempertimbangkan bahawa responden telah melanggar jaminan cagaran bahawa perintah jualan telah diperolehi oleh responden mengikut undang-undang.

Diputuskan (menolak rayuan dengan kos)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Ini bukan kes biasa di mana seseorang menjual hartanahnya sebagai 'penjual' kepada seorang 'pembeli' yang berminat. Responden sedang melaksanakan remedi statutori jualan sebagai pemegang gadaian di bawah Kanun Tanah Negara. Mahkamah akan melihat kepada asas sebenar transaksi dan bukan kepada lambang atau kemudahan istilah yang digunapakai oleh pihak-pihak. Walaupun terdapat penggunaan istilah 'penjual' untuk menggambarkan responden dalam kontrak jualan, ia tidak menjejaskan fakta bahawa responden telah menjual hartanah tersebut sebagai 'pemegang gadaian'.

(2) Sebab perayu tidak boleh menjadi tuan punya berdaftar hartanah itu bukanlah kerana responden telah melanggar syarat-syarat 'kontrak' yang didakwa telah dimeterai selepas lelongan yang berjaya itu, tetapi kerana perintah jualan telah diketepikan beberapa tahun kemudiannya, atas alasan-alasan yang tidak mempunyai kaitan dengan kontrak jualan yang dimeterai selepas lelongan tersebut. Dengan itu, responden tidak melanggar kontrak seperti yang didakwa.

(3) Tiada asas dalam hujahan perayu bahawa responden telah melanggar jaminan cagaran bahawa perintah jualan telah diperolehi secara sah. Pada tarikh itu, perintah jualan masih lagi perintah yang sah dan sempurna dan harus dipatuhi dan boleh digunakan sehingga ia diketepikan. Keterangan menunjukkan bahawa apabila jualan lelongan telah diadakan pada 12 September 1990 tiada permohonan dibuat untuk mengetepikan perintah jualan tersebut. Oleh itu, persoalan responden melanggar jaminan cagaran yang tersirat tidak timbul sama sekali.

(4) Kausa tindakan perayu terhadap responden telah diasaskan atas kontrak dan tort dan terakru apabila Mahkamah Tinggi mengenepikan perintah jualan pada 14 Jun 1997, tetapi guaman ini telah dimulakan oleh perayu hanya pada 16 Disember 2004, iaitu lebih dari enam tahun dari 14 Jun 1997. Jelas sekali bahawa tindakan perayu terperangkap oleh had masa.

Legislation referred to:
Limitation Act 1953, s. 6(i)(a)
Rules of the High Court 1980, O. 83

For the appellant - Balbir Singh (Ho Hon Keong with him); M/s Najiana Wan Balbir
For the respondent - Shantini Koshy; M/s Yong & Assocs

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S-022-1831-04]

Reported by Suhainah Wahiduddin

JUDGMENT

Clement Skinner JCA:

Introduction

[1] We had earlier heard the appeal of Ranjit Singh a/l Jarnail Singh ("the appellant") against the decision of the High Court, Kuala Lumpur given on 15 July 2011, when the appellant's claim against Malayan Banking Berhad ("the respondent") was dismissed with costs of RM50,000.

[2] After hearing the appellant's appeal, we dismissed it. These are our reasons for doing so.

The Background Facts

[3] On 15 February 1988 the respondent bank as chargee of a piece of land held under Grant No. 9611, Lot 26673, Mukim Kuala Lumpur ("the said property") obtained an order for sale by public auction of the said property from the Kuala Lumpur High Court.

[4] The sale was conducted on 12 September 1990 by the Deputy Registrar of the High Court assisted by a licensed auctioner. The appellant on being told by a friend about the sale, attended the auction and was the successful bidder for the said property at RM116,000.

[5] The appellant duly paid all sums due under the auction sale but the said property could not be transferred to him as there was a private caveat entered against the said property.

[6] On 14 March 1991 the chargor of the said property applied to the High Court to set aside the order for sale dated 15 February 1988 as well as the sale of the said property at the auction held on 12 September 1990. The High Court granted the orders applied for by the chargor on 14 June 1997, on the principle ground that the notice of adjourned hearing of the application for sale was not served on the chargor. The appellant had intervened in the chargor's application to set aside the order for sale.

[7] The respondent then appealed against the High Court order made on 14 June 1997. The Court of Appeal dismissed the respondent's appeal on 23 November 2002 in Civil Appeal No. W-02-601-1999. The Court of Appeal held that the order for sale of the said property was tainted with impropriety due to the chargee's failure to adhere to the provisions of the National Land Code and O. 83 of the Rules of the High Court 1980. However the Court of Appeal while affirming the decision of the High Court of 14 June 1997, set aside the order made by the High Court that damages be assessed and paid to the chargor and the intervener ie, the appellant here. The Court of Appeal made no orders regarding damages payable to the chargor and appellant as intervener. The Court of Appeal only ordered that the purchase price paid by the intervener (appellant here) be refunded in full.

[8] On 16 December 2004 which is some seven years and six months after the order for sale was set aside on 14 June 1997, the appellant commenced this suit against the respondent, pleading breach of contract, misrepresentation, negligence and breach of duties whether contractual, statutory, fiduciary or otherwise.

The High Court Decision

[9] After a full trial, the High Court Kuala Lumpur dismissed the appellant's claims and gave full reasons for doing so in a written judgment dated 18 June 2011. In summary the learned Judicial Commissioner found that:

(a) there was no breach of contract as alleged;

(b) there was no actionable misrepresentation, whether negligent or innocent;

(c) the appellant did not particularise the breach of duty alleged; A

(d) the appellant was uncertain of its causes of action and should have elected between inconsistent causes of action;

(e) the appellant's action is barred by limitation; B

(f) the appellant failed to mitigate his losses;

(g) the appellant had been fully refunded for the purchase price he paid for the said property at the auction and so should not be unjustly enriched by payment of damages. C

This Appeal

[10] The appellant contended that the learned Judicial Commissioner erred in holding that there was no contract between the appellant and the respondent in respect of which it D can be said the respondent was in breach of. The appellant said the learned Judicial Commissioner had disregarded the fact that in the contract of sale entered into after the successful auction the respondent bank was described as 'the vendor". The appellant further submitted that the learned Judicial Commissioner failed to E consider that the respondent was in breach of a collateral warranty that the order for sale was obtained by the respondent lawfully.

[11] We do not agree with the appellant's contentions. We find F no merit in them. The learned Judicial Commissioner was at pains to explain in her judgment that this was not a normal case of a person selling his property as "vendor" to an interested "purchaser". The learned Judicial Commissioner said this was a case of the respondent exercising its statutory remedy of sale as G chargee of the property under the National Land Code. As such it was not correct to describe the respondent as "vendor" which the appellant was trying to do. We agree with the learned Judicial Commissioner. The court will always look at the true substance of the transaction and not the badge or term of convenience used H by the parties. In our view despite the use of the term "the vendor" to describe the respondent in the contract of sale, it does not detract in any way from the fact that the respondent had sold the said property as "chargee".

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[12] More importantly, we find that the reason the appellant could not become the registered proprietor of the said property was not because the respondent had breached the terms of the alleged "contract" which was entered into after the successful auction, but because the order for sale was set aside some nine years later, on grounds totally unrelated to the contract of sale entered into after the auction. Therefore the respondent cannot be said to be in breach of contract as alleged.

[13] There is no substance in the appellant's contention that the respondent was in breach of a collateral warranty that the order of sale was obtained lawfully. The relevant moment in time which the court must consider in relation to this submission is at the time when the auction sale was held. Can it be said that the respondent was in breach of the alleged collateral warranty on 12 September 1990 when the appellant bid at the auction sale? Certainly not because as at that date the order for sale was still a perfectly valid order and had to be complied with and could be relied on until set aside. The evidence shows that when the auction sale was held on 12 September 1990 there was no pending application to set aside the order of sale of 15 February 1988. Therefore the question of the respondent being in breach of the alleged implied warranty did not even arise.

[14] The appellant complains that the learned Judicial Commissioner erred in dismissing his claims founded on misrepresentation, negligence and breach of duty, but we find that the learned Judicial Commissioner was correct in doing so. In respect of all these causes of action, the appellant relies on one central feature, namely, that the order for sale of 15 February 1988 was set aside some nine years later on 14 June 1997 on the ground of procedural impropriety.

[15] In our judgment all the appellant's causes of action above mentioned are clearly unsustainable in law. As we indicated earlier, the relevant question which the court has to ask itself is whether on the date of the successful auction on 12 September 1990, was the respondent guilty of the various acts of misrepresentation, negligence and breach of duty alleged by the appellant? Clearly the answer must be "NO" as the auction sale was held pursuant to a valid and subsisting order of court. There is no evidence that the

parties had been put on enquiry at the date of the auction as the application to set aside the order for sale was only made years later.

[16] Another ground on which the learned Judicial Commissioner dismissed the appellant's claim was limitation, which the appellant contends is wrong. We do not agree. In our view the learned Judicial Commissioner was correct in her decision. Here, the appellant's causes of action against the respondent are founded on contract and tort and would have accrued when the High Court set aside the order of sale on 14 June 1997, but this suit was commenced by the appellant only on 16 December 2004 which is well after six years from the 14 June 1997. The appellant contends that it was only following the decision of the Court of Appeal on 23 November 2002 that he was deprived of his right to have damages assessed. The appellant contends that his right cannot be separated from his remedy. Therefore, according to the appellant, time will only run from 23 November 2002 and so this action was filed well within the six years limitation period provided in s. 6(i)(a) of the Limitation Act 1953.

[17] We do not agree. The remedy which the appellant seeks must be based on a cause of action and here the appellant's causes of action are based on the fact that the order for sale was set aside on 14 June 1997, thereby giving the appellant the right to bring this action. Clearly the appellants action is caught by limitation.

[18] We are not inclined to consider the other grounds raised by the appellant, such as whether the learned Judicial Commissioner was correct to say that the appellant was uncertain of its causes of action or that the appellant had not elected whether he would pursue his claim for breach of contract or misrepresentation or that the appellant was not entitled to the damages he seeks and had failed to mitigate his losses. In our view these issues are really subsidiary issues which would only be relevant if the appellant can show that the learned Judicial Commissioner had erred in the main issues before her, which we find is not the case.

[19] For all the reasons given above, we dismissed the appeal with costs of RM20,000 and order a refund of the deposit.